TESTIMONY OF
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STANDING ROCK SIOUX TRIBE
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON STANDING ROCK RESERVATION WATER CRISIS
November 18, 2004

Introduction

Good morning Mr. Chairman and members of the Committee. I am Charles W. Murphy, the Chairman of the Standing Rock Sioux Tribe. With me this morning is Tribal Councilman Mike Claymore, who serves as Chairman of the Economics Committee. We greatly appreciate the longstanding concern this Committee has shown for the needs of our Tribe. Today we are here to discuss an ongoing crisis our people are experiencing concerning one of the most basic and critical elements for any community - water.

Next week is Thanksgiving. Exactly a year ago, over Thanksgiving weekend of 2003, we had no water for our people. Water levels in Lake Oahe reached historic lows and massive amounts of sediment moved down river, completely burying the water intake system that provides water for our people.

Without any warning, we had no source of safe water for two of our largest Reservation communities. Several thousand Reservation residents had no water for many days. We had no water in our homes, in our Tribal government offices, in our schools and in our hospital. Our irrigation projects were affected, and we lost our crops. Several tribal businesses were shut down for many days. The result was tremendous social and economic hardship for our people, as we struggled first to address the most basic health and safety needs in our communities.

In this testimony, I will try to give the Committee some sense of what it was like to be on a Reservation without water in those difficult days around Thanksgiving a year ago. This problem most seriously affected our children, our elderly, and those needing medical

care – and I will tell you about some of their experiences.

I will also show you pictures of the water conditions we face today. I have brought photos showing 1997 conditions around Fort Yates, when Lake Oahe was at normal levels, as well as photos showing current conditions. The difference is almost unbelievable. Where people were previously at risk of drowning, you can now walk across the river. I will also present photos showing the underlying causes of the Tribe's water shortage problem. These were produced by an engineering team from the University of Minnesota, following a fly-over study of the current river conditions.

The problem we faced last year may well occur again – and we are particularly at risk when the water freezes this winter. In dealing with the crisis last year, the Tribe spent a considerable amount of our own Tribal revenues as part of our response to the emergency. We are still waiting to be reimbursed for all these costs, and we certainly cannot afford to incur these costs again. While we have been reimbursed by the U.S. Bureau of Reclamation for some of those costs, many well-documented Tribal emergency response costs still have not been reimbursed – including some $400,000. The Tribe did not create the conditions for the water crisis to occur, and we should not be made to absorb these costs. We hope the Committee can assist us in resolving the issue of reimbursement of the Tribe's direct costs once and for all.

I also ask for the Committee's help as we develop a long-term physical solution to our water intake problems. As matters now stand, the intake system currently in place to provide water to our people is, at best, a temporary solution. While we have water for our people today, the problem we faced last year could happen again at any time. Water levels remain low and sediment, pump failures and freezing conditions are constant threats to the operation of our systems. Many of our people live in fear that the water will

be shut off at any moment. I have many Tribal members who fill up their bathtubs every night for fear of running out of water. This cannot be allowed to continue.

We need the Committee's support as we find a long-term engineering solution so that we can put these fears to rest. Like other America citizens, our people deserve the right to be confident that their water supply is safe and secure. We have some good ideas on how to go about this, which I will share with the Committee in my testimony this morning. I would also ask the Chairman for permission to follow up on today's testimony by providing additional written testimony focusing on these technical issues, within 14 days of today's hearing. We provided background material to Committee staff last week, and we would be happy to provide additional copies of these materials as needed.

Background on the Tribal Water Systems

The Standing Rock Reservation is home to over eight thousand residents and includes our eight Districts, which are our Reservation communities. The Reservation encompasses approximately 2.3 million acres situated in North Dakota and South Dakota. The Reservation consists of all of Sioux County in North Dakota and all of Corson County in South Dakota.

Reservation communities in North Dakota, Fort Yates, Cannonball and Porcupine are served through one treatment plant and intake system that takes water from Lake Oahe. The water is pumped from Fort Yates to Cannonball and Porcupine through a rural water system, which also serves approximately 150 homes located just outside these three communities. This is the system that failed last Thanksgiving.

Most of the South Dakota Districts are currently served from well water. Bear Soldier, Rock Creek and Little Eagle are served from a well field, and the community of

Kenel is served from a single well located five miles south of the community. A second water treatment plant in Wakpala takes water from the Grand River arm of Lake Oahe to serve that community.

Well water on the Reservation has high levels of minerals and sodium. The dissolved solids, salts and other minerals in the ground water make it mostly unusable for cooking, washing and livestock. This water is also unsafe for infants, the elderly, and tribal residents with diabetes and other medical conditions. Many Standing Rock residents are forced to buy bottled water and haul water for domestic purposes because of the poor ground water quality.

The Tribe's long range water development plan is to serve all Reservation communities from Missouri River water. The water is of high quality compared to the ground water available in our communities. Because of the Tribe's need for a safe and dependable Missouri River water supply, we were pleased to be part of a joint State-Tribal effort – lead by our North and South Dakota Congressional delegations – to gain passage of the Dakota Water Resources Act of 2000 (DWRA). But funding under that Act has so far been insufficient to provide us with a dependable water supply system. The planned extension of our rural water system was also put on hold last year, when our limited DWRA funding was diverted by the Bureau of Reclamation to address the water emergency.

The current water crisis is particularly harsh because it comes after our long, painful history of violated treaty rights and the unilateral taking of our best lands for the Oahe project. It is a bitter irony that the same Oahe project that hurt us by flooding our homeland is now hurting us again by leaving us without any water at all.

Treaty History and Reserved Water Rights

The Standing Rock Sioux Tribe has continuously occupied the land that comprises the current Reservation since long before the Lewis and Clark expedition. The Tribe reserved the exclusive rights to the lands of the Reservation and the water (at one time including entire portions of South Dakota and North Dakota west of the Missouri River) in the Treaty of 1851 and the Fort Laramie Treaty of 1868.

The 1851 Treaty reserved the exclusive use and occupancy of the lands and water in much of North and South Dakota to the Great Sioux Nation, and the 1868 Treaty established a permanent Sioux homeland. Recognizing the importance of the Missouri River, the treaties established the eastern boundary of the Great Sioux Reservation on the east bank of the Missouri River and encompassed the entire channel of the river within the Reservation.

When Congress created the Standing Rock Reservation with its current boundaries in 1889, our Tribe's exclusive land and water rights were again reserved, and the Tribe became the sole owner of these rights. In *Winters v. United States*, 207 U.S. 564 (1908), tribal reserved water rights were confirmed. In that case, the United States Supreme Court ruled that a treaty between the United States and an Indian tribe establishing a permanent homeland for the tribe also reserved federally protected water rights that are paramount to other water rights.

However, despite our treaty rights, our Tribal lands were seized without our consent for development of the Oahe Dam, constructed in the 1950s. The Oahe project flooded 56,000 acres of prime Standing Rock bottomland and displaced 90 tribal families from their homelands. These Tribal lands were sacrificed to create Lake Oahe and provide flood control and navigation opportunities for downstream states in the Missouri River Valley. As this Committee and the Joint Tribal Advisory Commission (JTAC) have found, this came at the expense of the Tribe's sacred sites, grazing lands, shelter, wild game, water, and other means of economic stability for the Standing Rock people.

JTAC estimated our losses to be in the $181 to $349 million range. JTAC also recommended a series of additional measures to benefit the Tribe, including the return to the Tribe of the excess lands taken by the Corps of Engineers but not needed for the Oahe project, recommendations that irrigation be developed "to the fullest possible extent on the Standing Rock Reservation," and that a federally-funded municipal, industrial and rural water supply system be completed on the Reservation.

Today, Lake Oahe is a source of drinking water and irrigation for people located far from our Reservation. Lake Oahe water is pumped hundreds of miles to other communities in North and South Dakota; while many of our tribal residents – living right along its banks – do not have a dependable source of quality water for drinking and irrigation purposes. This is the historical backdrop for what happened last year.

Thanksgiving 2003 Water Emergency

Since the time it was created in the late 1950's, the Oahe Reservoir has been a massive lake alongside our Reservation. I was Chairman when, not too many years ago, steps had to be taken to prevent the roadway into Fort Yates from being flooded by the high water levels of Lake Oahe. But the current drought in the Upper Missouri River system – which has now lasted five years – and the U.S. Army Corps of Engineers' operation of the Upper Missouri dams have led to a dramatic dropping of the water levels.

Rather than a lake, the water around Fort Yates is now a "braided" river, which means that the river channel is not stable and could shift from year to year. The extended drought and the Corps' management of the Upper Missouri River have directly and adversely affected the operation of our treatment plants and the people we served through them. Our two water treatment plants – one in Fort Yates and the other in Wakpala – depend on "pooled" water for their intakes, as shown in the photos, but Oahe no longer provides the conditions needed for these intake systems to operate reliably. The movement of the Missouri River delta down river below Fort Yates during this period of

historically low water drastically increased the sedimentation in our area. The braided river channel could shift at any time, leaving our Fort Yates intake high and dry. This same sedimentation problem affects our two existing irrigation intakes at Cannonball and Fort Yates, and may well create similar problems for the future irrigation intake at Kenel.

In July 2003, the dropping lake levels first started to seriously affect the amount of water that could be pumped to the Fort Yates Treatment Plant. From November 20 - 23, 2003, the low water level and increased sedimentation combined to bury the Fort Yates intake with silt. The intake stopped operating, which forced the Fort Yates treatment plant to shut down. The communities of Fort Yates, Cannonball and Porcupine, with 852 homes, starting losing water service on Monday, November 24, 2003 when the pumps failed completely. The complete water outage lasted until Wednesday, November 26, 2003, when an overland pipeline started delivering some water to the intake structure. The period until the water supply was relatively secure and the water itself was confirmed to be safe to drink lasted nearly two weeks.

During the November 23-26 time period, there was no water at all in Fort Yates. Cannonball ran out of water on Tuesday, November 25th. Fortunately, Porcupine was kept supplied with water by the North Dakota National Guard. During the crisis, all Tribal resources were focused on solving this problem. The Tribe purchased and distributed bottled drinking water and other supplies. The Tribe's District offices also purchased and distributed bottled water, juice for diabetics, and paper plates because people could not wash their dishes. The District offices also purchased and provided food to the emergency crews working day and night to restore water.

At the expense of other important on-going tribal projects, our Tribal roads department built an access road over the silted river bed so that the heavy machinery would not get stuck in the mud. Our Tribal social service programs also provided emergency supplies, shelter and other resources to people without water.

Our Tribal members also pitched in. Some residents melted snow in their bath tubs to have water to flush their toilets. One of our elders put a 50 gallon barrel on his truck and went around distributing well water to his neighbors. People also cancelled their Thanksgiving plans and sought refuge in Bismarck and other towns that had water.

The most severe impact was on the young, the elderly and the sick. Our schools were closed for much longer than the water outage period because it could not be immediately determined the water was safe to drink, even after the water came back on. Our IHS hospital also was forced to shut down for several days. Dialysis patients and others with serious medical conditions had to be transported to Bismarck for treatment, typically three times a week. This created a tremendous hardship on these frail, elderly people, and the shuttles cost the Tribe and the IHS hundreds of thousands of health care dollars that would otherwise have been spent for direct medical care on the Reservation. Our IHS Service Unit Director Tim Yellow has reported that we were fortunate not to lose any patients during the dialysis shuttles, but that the next water outage could well be measured in lives lost.

In short, the water crisis has posed serious health risks, disrupted commerce and daily activity, and created financial and social hardships for the Standing Rock people. There is a detailed day-by-day account of the water outage and the joint Tribal-U.S. Bureau of Reclamation emergency response in the background materials we previously supplied to Committee staff.

However, just when we started to get a handle on the Fort Yates emergency, our Wakpala intake system was threatened. On December 1, 2003, we discovered that only 2 ½ feet of flowing water remained above that intake screen in a location where 3 feet of ice is normally expected in the winter. The Tribe again took immediate emergency measures to avoid another crisis. We obtained a grant to extend a new intake pipeline to

the deepest depth feasible in that location, but we have since learned that even this deeper intake structure could be threatened if Lake Oahe continues to hit new record lows.

Events since the Thanksgiving 2003 water outage

Tribal and Bureau of Reclamation personnel have worked through the winter and into the spring of 2004 to keep the Fort Yates emergency intake facilities in operation. We have constructed a new intake structure using a submersible pump, which we intend to use until a permanent replacement facility is constructed. Because we know the current system could go out at any time, we have also developed with Reclamation an emergency response plan in the event that the water levels drop again. But the current intake system is too costly and is operating on borrowed time.

Divers who examined the situation around our intakes shortly after the water outage, and in later months, have reported that silt and other river conditions around the intakes are changing rapidly and dramatically, and our intakes remain vulnerable. For example, a diver inspected the Wakpala Intake on December 14, 2003 and found it was only 1 ½ feet below the ice and in danger of freezing over. The design of the intake screen allowed him to manually rotate the screen to gain an additional six feet of water over the intake, narrowly averting another community water outage. As you can see from our photos, the water conditions remain quite unstable, and the water intake situation remains highly volatile.

The Tribe's Short and Long-term Proposals to Remedy the Water Crisis

So what is to be done to remedy the lingering effects of last year's water outage and to make sure it does not happen again? We have several recommendations, but they require the coordinated efforts of this Committee and the Congress, the Bureau of Reclamation, the BIA, the Indian Health Service, the U.S. Army Corps of Engineers and the Tribe, working in a true government-to-government partnership.

First, I request the Committee's assistance to help us resolve – once and for all – our current disagreement with the Bureau of Reclamation over reimbursement of the Tribe's direct costs in addressing the water outage emergency. The Tribe's direct out-of-pocket costs in responding to the water outage exceeded $800,000, but Reclamation has so far only allowed for the reimbursement of $449,249 in tribal costs.

I had hoped this reimbursement issue had been resolved when Commissioner Keys wrote to Senator Dorgan on August 5, 2004 stating that $2.8 million had been reprogrammed "to cover costs of the Fort Yates water intake repair," but we received only $261,000 in FY 2004 "year-end" Reclamation funding, and – as far as I know – none of it was for these prior tribal emergency costs. In fact, our tribal financial officer confirmed to me just before I came out here to testify that over $400,000 in Tribal costs still have not been found "allowable" by Reclamation. These costs include meal services provided to the intake repair workers by the Tribal District offices, juice and water purchases for our diabetics and the extra overtime and related costs of essential tribal government workers who were called in to address the water emergency and ensure that minimum government services continued to operate during the tribal office shut down.

So-called "camp costs" (meals and lodging) are plainly allowable expenses for any federal emergency repair project, which is exactly what the Fort Yates intake repair project was. The Tribe is at a loss to understand why Reclamation has so far found these costs to be disallowable. I would like clear answers from the Bureau of Reclamation so that we can resolve this issue as soon as possible and move forward. While I do not believe further legislation is needed to clarify the allowability of these costs, if it is, I would ask for the Committee and Reclamation's support for such legislation.

I would also like the Bureau's firm commitment that all the extra costs incurred to address the Fort Yates water emergency – whether incurred by the Bureau or by the Tribe – will not be counted against the Tribe's limited Dakota Water Resources Act (DWRA)

MR&I and irrigation funding caps. We need every penny of that money to complete the rural water and irrigation systems contemplated by the JTAC and the DWRA legislation.

These projects were promised to the Standing Rock Sioux Tribe long before the current water shortages arose, in order to meet the long-term water needs of the Reservation and to make the Tribe whole for the flooding of our fertile bottomlands. The well water serving several Reservation communities is still of poor quality, and the need for these MR&I and irrigation projects is as great as ever. Reclamation funding for these projects must not be reduced or delayed, as happened this year, to make funds available for the water shortage emergency. Doing so would only compound the historic wrongs and broken promises that were previously inflicted on the Tribe by the Federal government's development of the Oahe project.

I understand Bureau of Reclamation officials have verbally assured Senator Conrad and Senator Dorgan's staff that additional legislation expressly removing these emergency costs from the DWRA funding cap is unnecessary, but we need a concrete written assurance from Commissioner Keys and Secretary Norton that Reclamation will stick by its stated position. We do not want to go several years down the road and have Reclamation's position suddenly change to our detriment. If they are unwilling to provide this Committee with such written assurances, then we would ask the Bureau of Reclamation to support Senator Conrad's and Senator Dorgan's sensible effort to enact as law this exemption of the emergency repair costs from the DWRA funding caps. We have previously worked with Senator Conrad's and Senator Dorgan's staffs to draft proposed legislation, and we would be happy to share this legislative proposal with the other members of the Committee for their support.

Second, we must develop a long-term engineering solution to the water intake problem. While we have done the best we can to prepare for the next emergency, our people cannot be expected to live with the constant fear that their water will be shut off at

any moment. One idea discussed quite extensively by tribal planners and rural water officials is a proposal to develop permanent legislation that would authorize the construction of an "inland reservoir" system surrounding Fort Yates – modeled after Lake Audubon – to provide a secure "pooled" water intake source for the Tribe. I have brought a preliminary concept drawing showing what this inland reservoir might look like upon completion.

While still in a conceptual stage, this proposal potentially has several attractive features and incidental benefits. Among other things, it could provide:

1. a permanent and reliable water intake source for the Tribe's MR&I and irrigation projects;

2. wetlands and additional wildlife habitat;

3. additional emergency access routes in and out of Fort Yates, a prudent homeland security and disaster preparedness measure; and

4. potential economic development and recreation benefits (marina, fishing, boating etc.) for the Reservation and the surrounding area.

Since the land around Fort Yates is already a flood plain and covered in water when Lake Oahe is at normal levels, this proposal should be less disruptive to our Tribe's cultural and religious sites. Our preliminary estimates suggest that the water required to maintain the inland reservoir would also be fairly insignificant from the perspective of the overall flow of the Missouri River. It would not have a major impact on downstream users. It may also provide a fairly cost effective engineering solution to the Tribe's water intake problem. The proposal would certainly be preferable to continually relocating the Tribe's intakes, seeking out ever deeper intake locations in the braided river channel from

year to year.

However, we also have other several innovative engineering ideas under active consideration, including constructing a new "single source" water intake system and treatment plant to serve the entire Reservation, which may or may not be done in conjunction with the inland reservoir concept. Possible sites under consideration are Fort Yates, Kenel and Wakpala. A recent survey found one deep site near Wakpala in the old river channel that is approximately fifty feet deep under current river conditions. The survey also found a site near Fort Yates consisting of a large gravel deposit where it may be possible to drill horizontally to develop a water intake that would operate at all river or lake conditions. Finally, the University of Minnesota engineers proposed constructing reinforced banks to stabilize the river channel and guide the water over our intakes.

All these ideas require further sedimentation studies and engineering feasibility studies before a final course of action is decided upon, but we must not wait for years of government studies. This on-going emergency situation requires extremely prompt action for all of us. I therefore ask for the Committee's full support and assistance to develop authorizing legislation, not only to study, but also to plan, design and construct the most feasible and beneficial long-term water intake solution for the Reservation.

Equally important, our guiding principle for any of the projects selected is that the cost of this long-term solution must come from the Army Corps of Engineers' budget – not the IHS, BIA, or Bureau of Reclamation budgets – because the Corps' management of the Upper Missouri River has been most directly responsible for our current water shortage problems. It is the Corps that has allowed the limited water supply to flow downstream to maintain barge traffic, while our people face a lack of water to drink. As I mentioned above, the funding for this project must not be drawn from the Bureau of Reclamation budget because it would interfere with on-going tribal water projects authorized under the Dakota Water Resources Act.

Finally, I would like this Committee's help to assist the BIA and the IHS to recoup the additional funds they spent to address the water emergency. As Senator Dorgan knows, our Acting BIA Great Plains Regional Director verbally assured us and Senator Dorgan that the BIA would reprogram FY 2004 "year-end" funds to compensate the Tribe for the Indian Reservation Roads (IRR) program funding that was used to build a temporary access road for the emergency repair crews. Unfortunately, the Acting BIA Regional Director has moved to another position, and FY 2004 came and went without the promised reprogramming of funds.

Similarly, our IHS Service Unit Director Yellow and his excellent staff all worked hard transporting dialysis patients to Bismarck and taking other steps to address the health-related aspects of the water outage. Director Yellow has determined that the IHS Service Unit at Fort Yates lost a total of $324,650 due to administrative leave and related costs, extra overtime for maintenance personnel and dialysis drivers, and lost third party collections. This money could have been used to provide health care services to our Tribal members. Again, we believe the Corps of Engineers is the federal agency that is most responsible for these extra costs and should help to replace them through its budget.

Conclusion

We look forward to working with the Committee and the relevant federal agencies to address these difficult issues in the most positive and constructive manner possible.